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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EMMA WILLIAMS,

Plaintiff, Cross-Defendant
and Respondent,

v.

DENNIS ABLAKHAD,

Defendant, Cross-Complainant
and Appellant.

B204042

(Super. Ct. No. MC 012918)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Alan S. Rosenfield, Judge. Affirmed in part, reversed in part and remanded with
directions.

Law Offices of Ira N. Katz and Ira N. Katz for Defendant, Cross-Complainant
and Appellant.

Martin T. Yarnell for Plaintiff, Cross-Defendant and Respondent.

A used car dealer appeals from a judgment to challenge (1) the jury's verdicts in favor of the buyer on her causes of action for breach of contract and breach of the covenant of good faith and fair dealing, (2) the trial court's order granting the buyer's motion for judgment notwithstanding the verdict overturning the jury's favorable verdicts on his cross-complaint, and (3) the court's award of attorney fees to the buyer as the prevailing party in the action. We reverse certain aspects of the damage awards which are unsupported by substantial evidence or legally erroneous and otherwise affirm the judgment.

FACTUAL BACKGROUND

In June 2000, respondent Emma Williams (formerly known as Doretha Bush) purchased a used 1990 Cadillac from appellant Dennis Ablakhad, doing business as Twins Auto Sales. The sales contract stated the purchase price was \$6,100, to be paid with \$3,300 down, and with the balance of \$3,100 financed through Ablakhad at a rate of 24 percent per annum, payable in 10 monthly payments of \$385 each, beginning July 20, 2000.

In July 2000, Williams entered into a second contract with Ablakhad to purchase a 1996 Dodge Intrepid for her daughter, Icha Marie Williams. This contract reflected a purchase price of \$8,300, payable as \$2,500 down, \$1,900 in a "deferred down payment," and a balance of \$3,900 financed through Ablakhad at an interest rate of 23 percent per annum, payable in 24 bi-monthly payments of \$200 each, beginning September 3, 2000. On the same date Williams purchased the Dodge Intrepid for her daughter, Williams paid Ablakhad the \$3,100 balance due for the Cadillac. Ablakhad required Williams to sign a document pledging the Cadillac as security for her purchase of the Dodge Intrepid.¹

¹ The security agreement violated the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.). Civil Code section 2984.2 specifies that "No conditional sale contract, and no agreement between a seller and a buyer made in connection with a conditional sale contract, may provide for the inclusion of title to or a lien upon any property other than" generally the vehicle itself. (Civ. Code, § 2984.2, subd. (a).) Numerous other aspects of the contracts violated the Automobile Sales Finance Act as well, such as the finance rates, which exceeded the statutory maximum of one percent per annum, times the

In August 2000, Williams paid Ablakhad \$113, an amount she believed had accrued in interest during the two months between the sale date and the date she paid the remaining balance on the Cadillac. She requested the “pink slip,” or the evidence of title to the Cadillac, but Ablakhad refused, explaining he intended to retain the document as additional security for payment of the debt on the Dodge Intrepid.

In June 2001, Ablakhad received notice from the Department of Motor Vehicles that Williams’s check for \$173 to pay the vehicle registration for the Dodge Intrepid had been returned for insufficient funds. The next day Ablakhad repossessed Williams’s Cadillac. He sold the Cadillac to a third party sometime later. Inside the car was a wheelchair belonging to one of Williams’s foster children.

Williams had by then paid over \$6,000 toward the purchase price of the Dodge Intrepid. After Ablakhad repossessed her Cadillac, she made no further payments on the Dodge. Ablakhad never requested further payment toward, nor return of, the Dodge for nonpayment.

Williams filed suit against Ablakhad, *in propria persona*, in September 2001. Ablakhad answered and cross-complained for breach of contract, fraud and conversion. Williams retained counsel, answered the cross-complaint, and filed an amended complaint alleging eight causes of action (including breach of contract, conversion, improper impounding, and intentional and negligent infliction of emotional distress).

The dispute was tried to a jury which during deliberations submitted at least three questions about the verdict forms. The trial court found the forms were inaccurate and confusing, made corrections, and tried to provide explanations to the jury. Ultimately, the jury found in Williams’s favor on her breach of contract and breach of the covenant of good faith and fair dealing causes of action and against Williams on other of her claims. The jury could not reach verdicts on still other of Williams’s causes of action

number of months between the contract date and the due date of the last installment. (See Civ. Code, § 2982, subd. (j)(1)(A)(ii).)

and the trial court declared a mistrial as to those claims. The jury found in favor of Ablakhad on his cross-complaint for breach of contract and conversion.

Williams filed a motion for judgment notwithstanding the verdict, claiming that the verdicts for Ablakhad on his cross-complaint were not supported by the law or evidence. The trial court ordered the entire case retried, stating that it believed the jury was confused by the deficient instructions and erroneous verdict forms. Williams appealed, and this court reversed, holding the trial court had no authority to order a new trial *sua sponte*. (*Bush v. Twins Auto Sales* (February 23, 2006, B180896) [nonpub. opn.].) We ordered the trial court to consider Williams’s motion for judgment notwithstanding the verdicts on Ablakhad’s cross-complaint and to set the case for retrial of the three unresolved claims asserted in Williams’s complaint.

On remand, (1) the trial court granted Williams’s motion for judgment notwithstanding the verdicts on Ablakhad’s cross-complaint, (2) Williams dismissed without prejudice her remaining claims on which the trial court had declared a mistrial, and (3) the trial court found Williams to be the prevailing party in the action and awarded her attorney fees.

Ablakhad appeals.²

DISCUSSION

I. SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY’S VERDICTS

Ablakhad makes a series of arguments attacking the sufficiency of the evidence to sustain the verdicts. In resolving the issue of the sufficiency of the evidence, “we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment”

² Ablakhad argues the trial court lacked jurisdiction to hear the dispute. He asserts Williams failed to comply with the Automobile Sales Finance Act (Civ. Code, § 2984.4, subd. (c)) by allegedly failing to file an affidavit stating facts showing the action had been filed in the proper location. Ablakhad is mistaken. Civil Code section 2984.4 is a statute specifying proper venue, and is not jurisdictional. Williams filed her action in Lancaster, the superior court and location of his used car business, where the “contract” “was in fact signed by the buyer” and thus in the proper venue and in compliance with the act. (Civ. Code, § 2984.4, subds. (a) & (b).)

(*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.) “‘When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.’ [Citation.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

A. Breach of the Sales Contract for the Cadillac

The jury found in favor of Williams on her breach of contract claim and awarded her (1) \$8,000 for the Cadillac, (2) \$10,000 for lost use of the Cadillac, (3) \$800 to replace the wheelchair lost in the repossession of the Cadillac, (4) \$52 in excess interest paid on the sales contract, and (5) \$1,000 for her time and expenses in attempting to recover her property.³

Ablakhad argues the \$8,000 awarded by the jury for loss of the Cadillac is unsupported by the evidence. We agree. The only evidence to show the value of the Cadillac was the evidence of the \$6,213 Williams actually paid for the car in 2000. There was no evidence presented from which the jury could reasonably find that the car’s value was \$8,000 and thus more than Williams actually paid for the car three years before. Accordingly, the damage award for loss of the Cadillac must be reduced to what the evidence showed, namely that the car was worth at most \$6,213.⁴

B. Damages for Lost Use of the Cadillac

Ablakhad also challenges the jury’s award of \$10,000 for lost use of the Cadillac on the ground that Williams introduced no evidence of a fair market rental value of the

³ Ablakhad does not challenge this particular aspect of the damage award for breach of contract so we do not consider its propriety.

⁴ In light of our conclusion we need not separately address Ablakhad’s argument that Williams was entitled to no more than the \$6,213 she paid for the Cadillac on the ground the Automobile Sales Finance Act specifies a buyer’s remedies are limited to all monies paid under the unenforceable contract, or to retain the vehicle and reaffirm the contract (Civ. Code, §§ 2983, 2983.1).

Cadillac to substantiate her claim of having suffered damages from lost use of the Cadillac. His claim has merit.

At trial, Williams testified she went to a car rental agency but the available cars were too small for her needs and she did not rent a replacement vehicle. Ablakhad made a relevance objection to her testimony. The court did not rule on his objection. Instead, the court asked counsel to come to side bar where they had an unreported discussion. Counsel did not question Williams further regarding any costs she might have incurred to secure a replacement vehicle for the Cadillac or the rental value of a car similar to the Cadillac, and Williams did not offer any evidence regarding car rental costs she incurred. Later in her testimony Williams stated that she was then driving an Astro van but offered no evidence regarding its ownership, age, condition, or cost.

In closing argument, Williams's counsel told the jury to use their "common sense" in determining Williams's loss of use damages. Counsel told the jury the daily rental rate for a small car was between \$10 to \$15 a day, but that the cost to rent a Cadillac was probably \$50 a day, and that because three years had elapsed since Ablakhad wrongly repossessed her car, the jury should award \$54,750 in damages for her lost use of the Cadillac. The court overruled Ablakhad's objection to counsel's argument.

Ablakhad argues that the jury's award of \$10,000 for lost use damages is not supported by any evidence. We agree. Counsel's argument in closing was not evidence, and the jury was so instructed. (CACI No. 106 [counsels' "statements and arguments are not evidence"].) The jury's award could only have been based on the jurors' "common sense," or on speculation, because there was no evidence of \$10,000, or any other amount in lost use damages on which to base the award. The jury was, however, instructed it "must not speculate or guess in awarding damages." (CACI No. 350 [introduction to contract damages].)

Williams counters that Ablakhad should not be permitted to take advantage of this evidentiary gap because Ablakhad's objection precluded her from presenting evidence of the cost to rent a replacement car. The record does not disclose whether the

trial court ruled on Ablakhad's relevance objection, and thus does not show whether Ablakhad's objection in any way prevented Williams from presenting evidence of lost use damages. Accordingly, the \$10,000 jury award for lost use must be reversed for insufficient evidence.

C. Wheelchair Loss

Ablakhad next claims the jury's award of \$800 representing Williams's out-of-pocket costs to replace the wheelchair lost with the repossessed Cadillac is not supported by substantial evidence. We disagree.

Williams testified that one of her foster children's wheelchair was in the Cadillac when Ablakhad repossessed it and that despite her repeated requests, he refused to provide her with an inventory of the car's contents, and refused to return the wheelchair. Williams further testified that she purchased a used wheelchair for the child's use until the Department of Children and Family Services provided the child a new replacement motorized wheelchair which cost between \$6,000 and \$8,000. On cross-examination, Ablakhad presented evidence in the form of Williams's answers to interrogatories that she had paid \$800 of her own funds to purchase the used replacement wheelchair. Williams agreed she had paid this amount and confirmed that she had only paid for the used replacement wheelchair and not the new expensive motorized wheelchair which the Department of Children and Family Services supplied once she convinced the department of the circumstances of its loss and of her attempts to have Ablakhad return the chair to her.

The foregoing constitutes substantial evidence to support the jury's award of \$800 for the lost wheelchair. An implied term of the sales contract was that Ablakhad would provide Williams the required statutory notice before he disposed of her vehicle so that she could—at minimum—remove personal items from the repossessed car. (See Civ. Code, § 2983.2, subd. (a) [requiring a minimum of 15 days' notice of the defaulting buyer's conditional right to reinstate a contract, and before a seller may dispose of a repossessed vehicle]; subd. (b) [regarding a buyer's right to an accounting after a seller disposes of a repossessed vehicle].) Because Ablakhad did not provide an inventory of

the Cadillac's contents, nor the required statutory notice which would have enabled her to retrieve the wheelchair before its loss, it was foreseeable that as a consequence Williams would suffer additional damages to replace the lost wheelchair.

II. DUPLICATIVE CLAIMS FOR BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Williams presented as a separate theory for recovery a claim for breach of the covenant of good faith and fair dealing. In its special verdict the jury found Ablakhad had breached the covenant of good faith and fair dealing by refusing to deliver title to the Cadillac after Williams had fully paid her obligation under the sales contract, and by repossessing the Cadillac because registration fees had not been paid on the Dodge. The jury found as damages for breach of the covenant of good faith and fair dealing \$2,000 for loss of the Cadillac and \$2,000 for lost use of the Cadillac.

Ablakhad claims that the jury's verdict on the cause of action for breach of the covenant of good faith and fair dealing was defective in that the evidence and damages supporting the claim were duplicative of the cause of action for breach of contract. He thus argues the verdict for breach of the implied covenant of good faith and fair dealing should be disregarded as subsumed within the verdict for breach of contract. We agree.

The evidence supporting both claims for breach was identical as a factual matter, namely, his wrongful refusal to deliver title and his wrongful repossession of the Cadillac. In addition, the damages sought for both claims were the same: (1) loss of the Cadillac, (2) lost use of the Cadillac, (3) loss of the wheelchair, (4) loss of other personal property in the Cadillac, and (5) expenses incurred in attempting to recover her property. Because Williams's cause of action for breach of the covenant of good faith and fair dealing relied on the same wrongful acts and sought the same damages as her breach of contract claim, the claim for breach of the covenant of good faith and fair dealing created no separate liability and should have been "disregarded as superfluous as no additional claim [was] actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Williams nevertheless asserts that Ablakhad's acts invaded two primary rights, giving rise to two causes of action. For this reason, she claims, his acts of wrongfully withholding title and wrongfully repossessing her car breached the contract and also amounted to tortious acts in breach of the covenant of good faith and fair dealing. We disagree.

“The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot “be endowed with an existence independent of its contractual underpinnings.” [Citations.]” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.) The “general rule preclude[s] tort recovery for noninsurance contract breach, at least in the absence of violation of ‘an independent duty arising from principles of tort law.’ [Citation.]” (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102.)

Although the covenant of good faith and fair dealing was implied in the sales contract, its breach did not constitute a tort in the context of this case involving a retail transaction in which no special relationship or special duty was either alleged or proved.

III. JUDGMENT NOTWITHSTANDING THE VERDICT ON ABLAKHAD'S CROSS-COMPLAINT

The jury found in favor of Ablakhad on his claim for breach of the sales contract for the purchase of the Dodge Intrepid and awarded him \$2,950 in damages. Williams moved for judgment notwithstanding the verdict and the court granted the motion, finding the sales contract for the Dodge violated the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.), which rendered the contract “void.” The court also found Ablakhad received more than the equivalent value of the balance due for the Dodge by repossessing the Cadillac under the illegal security agreement.

On review of an appeal from a judgment notwithstanding the verdict, an appellate court views the evidence in the light most favorable to the appellant and will

reverse the judgment if substantial evidence exists to support the judgment for the appellant. (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72, 77-78.)

Ablakhad argues that the court erred in finding the illegal sales contract void rather than voidable at Williams's instance. We agree. Under the Automobile Sales Finance Act, a contract which violates its provisions is "unenforceable" until the offending provisions are "corrected," and if the violations are not corrected "the buyer may recover from the seller the total amount paid" (Civ. Code, § 2983.) Nothing in the act suggests a sales contract which contains provisions which violate the act is illegal and thus void in its entirety. To the contrary, Civil Code section 2983.1 specifies that in the event a buyer is aware the sales contract is unenforceable because its terms violate the act, the buyer may nevertheless, "elect to retain the motor vehicle and continue the contract in force or may, with reasonable diligence, elect to rescind the contract and return the motor vehicle." In other words, the remedy provisions of the act do not authorize a total disregard of the contract as void.

In this case, Williams elected to retain the Dodge, and by doing so, elected to continue the contract in force. By refusing to make further payments under the sales contract for the Dodge she breached the contract, and the jury so found. Substantial evidence supports the jury's finding and we will reverse the judgment notwithstanding the verdict on Ablakhad's contract cause of action and reinstate the jury's verdict awarding him \$2,950 in damages on this claim, approximately the amount owed on the sales contract for the Dodge.⁵

The jury also found for Ablakhad on his conversion claim and awarded him an additional \$1,475 in damages. This cause of action was based on the identical evidence that Williams had the Dodge in her possession but stopped making payments on the car once Ablakhad repossessed her Cadillac. Thus, the only damages proved at trial were those for breach of the sales contract, namely, the unpaid balance on the sales contract

⁵ Ablakhad is, of course, obligated to deliver evidence of title, or the "pink slip," to Williams for the 1996 Dodge Intrepid because under the judgment, he owes Williams more than she owes him for the Dodge.

for the Dodge. There was no evidence presented of any special damages or expenses incurred by Ablakhad from Williams's retention of the Dodge, nor of any other damages beyond evidence of the remaining balance due on the sales contract for the Dodge. We will thus affirm the court's order granting judgment notwithstanding the verdict on the conversion claim as it is duplicative of the evidence supporting, and damages awarded Ablakhad on, his breach of contract claim.

IV. AWARD OF STATUTORY ATTORNEY FEES TO WILLIAMS AS THE PREVAILING PARTY

Civil Code section 2983.4 states that "[r]easonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of this chapter regardless of whether the action is instituted by the seller, holder or buyer." The trial court found Williams was the prevailing party and awarded her \$28,591.50 in attorney fees as requested.

Ablakhad does not question Williams's entitlement to attorney fees under this provision of the Automobile Sales Finance Act. Nor does he challenge the amount of fees awarded. Instead, Ablakhad contends the fee award was erroneous because the trial court prematurely awarded the fees after Williams's successful appeal, but before a final judgment had been entered and a prevailing party determined.

Ablakhad cannot demonstrate prejudice even if the court's interim order awarding Williams attorney fees was premature. The attorney fee award did not become the final order of the court until after (1) the court ruled on Williams's motion for judgment notwithstanding the verdict, (2) Williams dismissed her remaining claims, and (3) the court made specific findings that Williams had been the prevailing party in the action and in her appeal. Nothing had changed between the court's interim order and its entry of final judgment, other than Williams having secured even greater relief in her favor. Accordingly, Ablakhad has not shown any abuse of the court's discretion in awarding the attorney fees in this case. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

DISPOSITION

The judgment is reversed to the extent it (1) awarded more than \$6,213 on Williams's breach of contract claim, (2) awarded Williams \$10,000 in damages for lost use of the Cadillac, (3) awarded Williams \$4,000 for breach of the covenant of good faith and fair dealing, and (4) failed to include the jury's award to Ablakhad of \$2,950 on his breach of contract claim; in all other respects the judgment is affirmed. The cause is remanded to the trial court with directions to prepare a new judgment (1) incorporating these modifications into the judgment, (2) offsetting Ablakhad's breach of contract damages of \$2,950 against the overall award to Williams of \$8,013, and (3) reflecting a net damage award to Williams of \$5,063, plus attorney fees of \$28,591.50. Each side to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

DUNNING, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.